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Court Protects Secured Creditor's Self-Help Remedy

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Court protects secured creditor's self-help remedy

by Michael Foster

In ***Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171 (Ill. App. Ct. 1996)**, the Appellate Court for the Fifth District of Illinois held that an "unequivocal oral protest" to the repossession of a debtor's collateral, without more, does not constitute a breach of the peace and, thus, does not preclude awarding a deficiency judgment to the secured party. Additionally, the court held that a creditor's trespass onto a debtor's property to effectuate repossession does not result in an automatic breach of the peace.

Chrysler repossesses vehicle

In early 1991, Chrysler Credit Corporation ("Chrysler") notified James Koontz ("Koontz") of its intention to repossess his 1988 Plymouth Sundance in the event he failed to catch up on his monthly car payments. Koontz's purchase agreement with Chrysler stipulated that he was to make sixty monthly payments in the amount of $185.92. Responding to Chrysler's notice, Koontz promised to remedy his delinquent account, but directed Chrysler not to enter upon his private property to repossess the vehicle. However, on April 21, 1991, Chrysler, pursuant to Illinois' self-help repossession statute, instructed the M & M Agency to repossess the car. The repossessor proceeded to take the vehicle, despite Koontz's protesting "don't take it." Chrysler subsequently sold the vehicle and filed a complaint, seeking a deficiency judgment against Koontz for the balance due under the sales contract.

Section 9-503 of the Illinois Commercial Code provides a secured party, on default, "the right to take possession of the collateral" and to "proceed without judicial process if this can be done without breach of the peace." 810 ILL. COMP. STAT. ANN. 5/9-503 (West 1994). At trial, Koontz contended that Chrysler's repossession of the car resulted in a breach of the peace; thus, the court should deny Chrysler the benefit of a deficiency judgment. The trial court found that a breach of the peace did not occur, and entered judgment in favor of Chrysler in the amount of $4,439.92.

Court defines "breach of the peace"

On appeal, Koontz further pursued his argument that Chrysler's repossession of the vehicle breached the peace. In support of his position, Koontz cited *Dixon v. Ford Credit Co.*, 391 N.E.2d 493 (Ill. App. Ct. 1979), in which the court determined that repossession by a creditor in disregard of the respective debtor's "unequivocal oral protest . . . may be found to be in breach of the peace." *Id.* at 497. Koontz contended that Chrysler's act of ignoring his objection to the repossession was a breach of the peace. Chrysler maintained that such a construction of "breach of the peace" would profoundly restrict the proper remedial scope of the self-help repossession statute. Chrysler argued that there can be no subsequent breach of the peace without an element of violence.

The appellate court, noting the statute's silence regarding the precise meaning of "breach of the peace," construed the statute to mean that conduct which "incites or is likely to incite immediate public turbulence" or "leads or is likely to lead to an immediate loss of public order and tranquility." *Chrysler Credit Corp.*, 661 N.E.2d at 1173. The appellate court rejected Koontz's proposition that an unequivocal oral protest could alone constitute a breach of the peace, recognizing that such a rule would allow a debtor to avoid a deficiency judgment by simply shouting at an indifferent repossessor. Additionally, the appellate court explained that violence is not a prerequisite to a breach of the peace. A breach of the peace is sufficient if the conduct complained of creates a probability of violence.

Addressing Chrysler's repossession of Koontz's vehicle, the court held that the trial court did not err in finding the peace undisturbed. The court noted that the repossessor did not respond verbally or physically to Koontz's protest. Likewise, the court found no evidence demonstrating that Koontz entertained or expressed any violent intentions towards the repossessor. Koontz's own testimony played a significant role during the trial. Koontz conceded that although he was close enough to respond more forcefully, he re-

frained from doing so because he was in his underwear. Thus, ample evidence existed to conclude that the repossession did not result in a breach of the peace.

Trespass onto debtor's property is not *per se* breach of the peace

Koontz alternatively argued that Chrysler breached the peace by repossessing his vehicle in a manner which constituted criminal trespass to real property under Section 21-3 of the Illinois Criminal Code. Under the Criminal Code, criminal trespass occurs when a person enters upon the land of another, despite having received prior notice from that individual that such entry is forbidden. 720 ILL. COMP. STAT. ANN. 5/21-3 (West 1994). Prior to the date of repossession, Koontz informed Chrysler that it did not have his permission to enter upon his land; consequently, he contended that Chrysler's potentially sanctionable criminal trespass amounted, at the very least, to a breach of the peace.

The court found the issue to be one of first impression in Illinois and, thus, proceeded to examine the relevant law from other jurisdictions. The court concluded that a mere trespass, in and of itself, does not result in a breach of the peace because the creditor enjoys a limited privilege, confined in purpose and in scope, to enter upon the land of a debtor. The court instructed that where the collateral is enclosed in some fashion, i.e., by fence, gate, chain, etc., the secured creditor's privilege is severely diminished, especially where repossession can only be accomplished by breaking down the barriers designed to exclude potential trespassers.

The court evaluated Chrysler's entry upon Koontz's real property in light of these considerations and did not find a breach of the peace under the circumstances. Chrysler's entry was limited to the purpose of repossession, and there was no evidence to indicate that any barricades or enclosures had been transgressed. Therefore, Chrysler exercised its privilege lawfully and the deficiency judgment stands unaffected.

Banks and lenders violated consumer protection laws with direct deposit accounts

by Aaron R. Pettit

In ***Cobb v. Monarch Fin. Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995)**, the United States District Court for the Northern District of Illinois held that the owner of a bank account, to which an allotted portion of the owner's paycheck was directly deposited and then immediately transferred to a lender, could state a cause of action against both the bank and the lender for violating disclosure requirements of the Electronics Funds Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r (1988), and for deceptive practices under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILL. COMP. STAT. 505/1-505/12 (1993). The court also held, however, that the owner of such an account could not state a cause of action against the bank for failure to meet disclosure requirements under the Truth in Savings Act ("TISA"), 12 U.S.C. §§ 4301-4313 (1995), against the lender under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667e (1988), and against both the bank and the lender under the Illinois Wage Assignment Act ("IWAA"), 740 ILL. COMP. STAT. 170/.01-170/11 (1993). Additionally, the court upheld the plaintiff's claim against the lender that the loan agreements were unconscionable, but dismissed the unconscionability claim against the bank.

From November 1993 to November 1994, Verlina Cobb ("Cobb") obtained a total of ten different loans from three finance companies ("the lenders"). As specified in the loan agreements, three banks ("the banks") created bank accounts in Cobb's name and electronically and directly deposited an allocated portion